Petition

81-1602

No.

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ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

October Term, 1981

J. D. WATKINS,
Petitioner,

vs.

PENTZIEN, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether a pipeline lay barge in navigable waters ceases being a "vessel" for Jones Act and general maritime purposes as a matter of law whenever it is temporarily "anchored" by lowering spuds through collars welded to one side, allowing the barge to float in alignment with a canal or slip dug into the marsh while a long section of the pipeline is constructed with floats attached and pushed into the water and up the slip.

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No.

In the Supreme Court of the United States

October Term, 1981

J. D. WATKINS,
Petitioner,

vs.

PENTZIEN, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION OF COURT BELOW

J. D. Watkins, Plaintiff-Appellee vs. Pentzien, Inc., Defendant-Appellant, No. 81-2023, United States Court of Appeals, Fifth Circuit, November 5, 1981.

JURISDICTIONAL STATEMENT

The opinion of the Court below dated November 5, 1981 together with judgment thereon was entered on November 5, 1981 and issued as the mandate on December 11, 1981.

Petition for rehearing was denied by order entered on December 1, 1981.

This Honorable Court has jurisdiction to hear this Petition for Writ of Certiorari pursuant to 28 U.S.C.A. §1254(1) and United States Supreme Court Rule 17.

STATUTORY PROVISIONS INVOLVED

46 U.S.C.A. §688, Jones Act.

STATEMENT OF THE CASE

Plaintiff went to work in navigable waters for his first time on a lay barge after being asked whether he had done so before. (Tr. 23) Plaintiff was assigned to work on Barges No. 40 and 41 tied together as a lay barge located in navigable waters in Sabine Pass where they were towed by tug for the construction of a section of pipeline across the channel at Sabine Pass. (Tr. 105) Although lay barges normally move from under the pipe each time a joint is added and shoved off into the water, this operation was conducted differently in order to lessen the interference with shipping and navigation and leave the channel open. (Tr. 105) The barge was brought near the edge of the bank where a canal or slip had been dug back into the marsh. (Tr. 26, 136) Metal poles or spuds were lowered to the bottom through collars welded to the barges to keep the barges aligned with the canal and from moving when the pipe with floats attached was shoved off in the water and up the slip. (Tr. 129, 130) There were no other anchors, moorings or attachments and the barges were free-floating. (Tr. 130, 131) The barges could move again by simply picking up the spuds and going. (Tr. 128, 138) The next move of this barge was across the channel of Sabine Pass to do a similar pipelaying operation near the opposite side. (Tr. 138) The end of the barge nearest to the bank was lowered by taking on water in order to lessen the angle at which the pipeline would enter the water. (Tr. 106, 107, 130) Plaintiff's primary duty was tending the tar pot and all of his work was involved in the specialized function of the barge, to-wit laying pipeline. (Tr. 143) Also

while in position and "anchored" Plaintiff's job involved maintenance on the barge and its equipment, including the life preservers and the lines keeping the two barges together. (Tr. 144) His job also involved handling lines, tying the tug and the barge, from the first day on. (Tr. 25, 26) He also handled fenders, life jackets, maintenance, cleaning and sweeping of the barge. (Tr. 26, 28, 29)

The pipeline crew, including Plaintiff, was also the barge crew since there was no one else to perform these duties except the pipeline crew. (Tr. 143)

This case was filed in the United States District Court pursuant to their admiralty and maritime jurisdiction. The Trial Court found the barge to be a "vessel in navigation". This fact finding was reversed and the Court below held as a matter of law that the barge was not a "vessel in navigation".

ARGUMENT

This decision of the Court below is in conflict with other Courts of Appeals, itself and the pronouncements of this Honorable Court and this Petition should be granted pursuant to Rule 17.

The holding of the Court below is in conflict with this Court's decision in *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370, 1 L.Ed.2d 404, 77 S.Ct. 415.

Status under the Jones Act has consistently been held to be a question of fact for the trier of fact to determine. The Court below has reversed a finding of the Trial Court establishing the barge as a "vessel in navigation" in the face of substantial evidence supporting the finding. This Court in *Senko* further indicated that the statute under which Plaintiff in this case claims, should be given liberal interpretation in favor of coverage by the Act.

The Court of Appeals has in this case held in conflict with both directives.

Their opinion likewise is in conflict with their own decision in *Offshore Company v. Robison*, 266 F2d 769, 75 A.L.R. 2d 1296 (5th Cir. 1959) wherein they held that each case must be factually determined on its own and laid down tests to aid in determining status. In conflict with that decision, the Court below has in this case reversed a trier of fact as a matter of law, giving as reason for the holding their inability to distinguish this case from *Leonard v. Exxon Corp.*, 581 F2d 522 (5th Cir. 1978).

The barge in *Leonard* was not a pipeline lay barge but rather a construction platform made up of barges permanently connected to an on-shore construction site by cables and walkways. In the instant case, our lay barge was stopped only long enough to construct and shove into the water a sufficient length of pipeline to be towed across the channel, and then it moved to the other side of Sabine Pass to conduct similar operations. It had no connection to the shore on either side and differed from a standard lay barge operation only in using the canals to shove pipe into, rather than moving from under the pipe after each length of pipe is added. The movement occurred with long lengths of floating pipeline across the channel in one operation to lessen interference with other ship and barge traffic. Except in rare circumstances, *only* the trier of fact can determine this issue, and its determination requires a very low evidentiary threshold on the part of the claimant. This is true even though the Appellate Court may disagree with the determination. The holding of the Court below has done violence to the pronouncements of this Honorable Court as well as its own.

PRAYER

Premises considered, Petitioner prays that his Petition for Writ of Certiorari to The United States Court of Appeals be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this the 25th day of February, 1982, three true and correct copies of the foregoing Petition for Writ of Certiorari were served upon the attorney for Respondent, L. Glen Kratochvil, 575 San Jacinto Building, P. O. Box 150, Houston, Texas 77002 by depositing same in the United States Mail with first-class postage attached.

DOYLE CURRY
Counsel for Petitioner

Appendix

APPENDIX

J. D. WATKINS, Plaintiff-Appellee,

v.

PENTZIEN, INC.,
Defendant-Appellant.

No. 81-2023
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Nov. 5, 1981.

Action was brought for injuries sustained while working on barges. The United States District Court for the Eastern District of Texas, Robert M. Parker, J., entered judgment, and appeal was taken. The Court of Appeals held that two barges on which workman was working at time of his injuries were not "vessels in navigation," as required both for workman to recover on general maritime law claim and for him to be entitled to protection of Jones Act, where the barges were used as construction platform on which sections of concrete-coated pipeline were welded together, the barges were tightly secured to each other, and the barges were attached to "spuds" dropped into bed of river.

Reversed and remanded for entry of judgment in favor of defendant.

1. Shipping (Key) 2

In order to qualify for coverage under Jones Act, worker claiming "seaman" status must have a more or less permanent connection with vessel in navigation, and capacity in which he is employed or duties which he performs must contribute to function of the vessel, accomplishment of its mission, or its operation or welfare in terms of its maintenance during movement or during anchorage for future trips. Jones Act, 46 U.S.C.A. § 688.

2. Shipping (Key) 29(5.16)

Whether worker claiming "seaman" status satisfies relevant criteria is normally question for trier of fact; nonetheless, undisputed material facts may establish as matter of law that individual is not Jones Act seaman. Jones Act, 46 U.S.C.A. § 688.

3. Shipping (Key) 29(1)

The two barges on which workman was working at time of his injuries were not "vessels in navigation," as required both for workman to recover on general maritime law claim and for him to be entitled to protection of Jones Act, where the barges were used as construction platform on which sections of concrete-coated pipeline were welded together, the barges were tightly secured to each other, and the barges were attached to "spuds" dropped into bed of river. Jones Act, 46 U.S.C.A. § 688.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Eastern District of Texas.

Before AINSWORTH, REAVLEY and RANDALL, Circuit Judges.

PER CURIAM:

The issue in this appeal is whether the two barges on which the appellee, J. D. Watkins, was working at the time of his injury were vessels in navigation, thereby entitling Watkins to the protection of the Jones Act and the general maritime law. The district judge found that they were. We hold that, as a matter of law, they were not vessels in navigation. Accordingly, we reverse the judgment of the district court awarding damages to Watkins on his Jones Act and general maritime law claims.

J. D. Watkins, an employee of Pentzien, Inc., was injured at work when he stooped over to pick up a chunk of tar from the deck of the barge on which he was working. Watkins had intended to throw the piece of tar toward the tar pots that he attended on the deck of one of the barges. But unexpectedly, it stuck to other chunks of tar and, while trying to lift it, he hurt his back.

Watkins filed this action against Pentzien in the United States District Court for the Eastern District of Texas. His complaint invoked the admiralty and maritime jurisdiction of the district court and included a Jones Act claim with added counts under the general maritime law for unseaworthiness and maintenance and cure. After a trial, the district judge found that Watkins was a seaman protected by the Jones Act and that the barge upon which he was working qualified as a vessel under the Jones Act. The district judge also resolved Watkins' general maritime law claims in his favor. A final judgment was entered awarding Watkins $75,000 in damages against Pentzien. Pentzien appeals.

[1, 2] In order to qualify for coverage under the Jones Act, a worker claiming seaman status must satisfy three criteria:

> (1) he must have a more or less permanent connection with (2) a vessel in navigation and (3) the capacity in which he is employed or the duties which he performs must contribute to the function of the vessel, the accomplishment of its mission or its operation or welfare in terms of its maintenance during its movement or during anchorage for its future trips.

Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447, 452 (5th Cir. 1980). Whether these criteria are satisfied is normally a question for the trier of fact. *Beard v. Shell Oil Co.*, 606 F.2d 515, 517 (5th Cir. 1979). Nonetheless, we also have recognized that the undisputed material facts may establish as a matter of law that an individual is not a Jones Act seaman. *Guidry v. Continental Oil Co.*, 640 F.2d 523, 528-29 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3009 (U.S. July 6, 1981) (No. 81-20). In such a case, it is proper for this court to determine seaman status. *See Holland v. Allied Structural Steel Co.*, 539 F.2d 476, 479-80 (5th Cir. 1976), *cert. denied*, 429 U.S. 1105, 97 S.Ct. 1136, 51 L.Ed.2d 557 (1977).

[3] As noted at the outset, we have predicated our decision in this appeal solely on whether the two barges on which Watkins was employed were vessels in navigation. With this in mind, we turn to the undisputed material facts.

Watkins was employed on two barges which were used as a construction platform on which sections of concrete-coated pipeline were welded together. These barges, each 200 feet long and forty feet wide, were placed end-to-end. They were tightly secured to each other on both the port and the starboard sides by steel cables. To make the barges level with each other, "I" beams were laid across their decks. One end of each "I" beam was welded to the deck of one of the barges.

After the barges had been fastened together, they were moved by tug into the Sabine River and placed at a right angle to the bank. In order to keep interference with shipping and navigation to a minimum, the barges were pushed close to the bank of the river where a slip had been dug to hold them. Four metal poles, known as spuds, were dropped to the bed of the river. The spuds were fastened to the barges by collars welded to the barges. The end of the barge nearest the bank was lowered to the level of the water by flooding several of the barge's rear compartments.

When operating, concrete-coated sections of pipe were brought to the end of the barge protruding into the river. The sections of pipe were placed on a conveyor, welded to the end of the pipeline on the barge, coated with a sealant, and eased off the end of the barge nearest to the river bank into a canal cut through the marsh. This process was repeated until a completed pipeline extended from the barge into the marsh.

We find that the two barges on which Watkins was hurt are factually indistinguishable from the pipeline construction platform on which the plaintiff in *Leonard v. Exxon Corp.*, 581 F.2d 522 (5th Cir. 1978), *cert. denied*, 441 U.S. 923, 99 S.Ct. 2032, 60 L.Ed.2d 397 (1979), was injured. In *Leonard*, we described the platform as

> four flat-deck barges. These barges were not self-propelled, and could be moved only by the application of some external source of power. Three of the barges were placed end to end and lashed securely together. According to the trial court, this three-barge structure was moored "more or less permanently" to the shore by separate steel cables. The fourth barge, which served as a crane platform and as an access ramp to the other three barges, was located between the

> shore and the remaining barges. This fourth barge was connected to shore by a wooden ramp. To permit the crane to service each of the three outer barges, the three-barge platform would occasionally be untied and moved slightly forward or backward until properly positioned.

581 F.2d at 524. The dissent also noted that "[o]nce the pipeline had been fabricated the string of offshore barges was towed into deeper water, and the assembled pipeline was slipped off into its destined place underneath the navigable waters of the Mississippi." *Id.* at 525 (Godbold, J., dissenting).

In *Leonard*, the district judge had granted summary judgment against the plaintiff on his Jones Act claim finding as a matter of law that the pipeline construction platform on which he worked was not a vessel. We affirmed on the basis of a prior opinion in which we held that "a similar floating construction platform, which was neither designed for navigation nor engaged in navigation at the time of the accident, was, as a matter of law, not a vessel under the Jones Act." *Id.* at 524 (citing *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973), *cert. denied*, 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed.2d 116 (1973)).

Our decision in *Leonard* controls the outcome of this appeal. The similarities between the pipeline construction platform described in *Leonard* and the structure on which Watkins was injured are unmistakable. Both were used to weld sections of the pipe together. Both consisted of barges fastened together. In neither case could the barges move under their own power. Both platforms had to be towed from place to place by a tug. In both instances the platforms were affixed "more or less permanently." *Leonard*, 581 F.2d at 524. In the instant case, the barges were held in place near the bank of the Sabine River by the spuds;

in *Leonard*, they were attached close to the bank of the Mississippi by steel cables.[1] We hold, therefore, as we did in *Leonard*, that Watkins is not covered by the Jones Act as the structure on which he was injured was not a vessel in navigation. *See Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 452 (5th Cir. 1980).

Our decision that the two-barge structure on which Watkins was injured was not a vessel in navigation also disposes of his claims under the general maritime law. "For the doctrine of unseaworthiness to apply in a personal injury case, . . . the vessel [must] be in navigation." 2 M. Norris, Maritime Personal Injuries § 321, at 69 (3d ed. 1975). In order to recover for maintenance and cure, the worker must be "employed on what can be termed a 'vessel' for admiralty purposes." 1B Benedict on Admiralty § 44, at 4-12 (7th ed. 1980). We said in *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1002 (5th Cir. 1973), *cert. denied*, 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed.2d 116 (1973), the decision upon which *Leonard* was predicated, that a barge used as a floating construction platform was not a vessel in navigation entitling an injured worker to claim under the

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1. The only possible difference between the pipeline construction platform in *Leonard* and the one on which Watkins was injured is their accessibility. Although both were near the bank of a river, in *Leonard* the barges on which the plaintiff was injured could be reached by crossing over a ramp built from the bank of the river onto and across the crane barge to the three barges on which the pipeline was fabricated. In this case, as the bank of the Sabine River near the barges consisted of marshland, Watkins was transported to and from his workplace by tug each day. The status of a structure as a vessel in navigation, however, is unaffected by its accessibility to those who are assigned to it. The critical inquiry is "the purpose for which the craft was constructed and the business in which it is engaged." *Cook v. Belden Concrete Prods., Inc.*, 472 F.2d 999, 1001 (5th Cir. 1973) (citing *The Robert W. Parsons*, 191 U.S. 17, 30, 24 S.Ct. 8, 12, 48 L.Ed. 73 (1903)), *cert. denied*, 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed.2d 116 (1973). *Accord, Hicks v. Ocean Drilling & Exploration Co.*, 512 F.2d 817, 823 (5th Cir. 1975), *cert. denied*, 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 639 (1976); *Berfect v. American Commercial Barge Lines*, 509 F.Supp. 734, 736 (E.D.La.1981).

general maritime law. Therefore, because the structure on which Watkins was injured was not a vessel in navigation, Watkins may not recover under the general maritime law. *See* G. Gilmore & C. Black, The Law of Admiralty § 6-21, at 329 (2d ed. 1975).

The undisputed facts in this case establish as a matter of law that Watkins neither is a Jones Act seaman nor is entitled to recover for his injuries under the general maritime law. The decision of the district court is REVERSED and the case is REMANDED for entry of judgment in favor of Pentzien, Inc. on Watkins' Jones Act and general maritime law claims.

REVERSED.

(Filed December 14, 1981)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-2023
Summary Calendar

D. C. Docket No. CA-B-79-503
J. D. WATKINS,
Plaintiff-Appellee,

versus

PENTZIEN, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

Before AINSWORTH, REAVLEY and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that the plaintiff-appellee pay to the defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

NOVEMBER 5, 1981

ISSUED AS MANDATE: DEC 11 1981

(Filed December 1, 1981)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-2023

J. D. WATKINS,
Plaintiff-Appellee,

versus

PENTZIEN, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING

(December 1, 1981)

Before AINSWORTH, REAVLEY and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

Appendix

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No. 81-1602

In the Supreme Court of the United States

October Term, 1981

J. D. WATKINS,
Petitioner,

vs.

PENTZIEN, INC.,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPPLEMENTAL APPENDIX

(Filed December 22, 1980)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-79-503-CA

J.D. WATKINS

V.

PENTZIEN, INC.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Pursuant to Federal Rule of Civil Procedure #52, the Court hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about April 3, 1978, Plaintiff was working aboard Defendant's barge as a seaman.

2. There was inadequate supervision aboard the barge.

3. There was a lack of proper equipment aboard the barge.

4. Plaintiff became injured while attempting to lift mastic blocks which were stuck together.

5. At the time of injury, Plaintiff was earning $4.90 1/2 per hour plus $5.00 per day for the use of his pick-up truck.

6. The injury resulted in a reduction in Plaintiff's capacity to work.

CONCLUSIONS OF LAW

1. Plaintiff was a "seaman" protected by the Jones Act.

2. Defendant's barge constitutes a "vessel" under the Jones Act.

3. Failure to provide proper equipment and adequate supervision constituted negligence on the part of the Defendant.

4. Lack of proper equipment and inadequate supervision rendered the Defendant's barge "unseaworthy".

5. Defendant's negligence and the unseaworthiness of the Defendant's barge were proximate causes of Plaintiff's injuries.

6. Plaintiff was 40% negligent and such negligence was a proximate cause of Plaintiff's injuries.

7. The Court finds that the amount of One Hundred Twenty Thousand ($125,000.00) Dollars will fairly and reasonably compensate the Plaintiff for his injuries and damages.

8. All court costs are taxed against the Defendant.

9. Attorneys' fees are to be paid by the Defendant.

10. Interest of Nine (9%) percent per annum shall be assessed against the Defendant until judgment is paid.

11. Any Finding of Fact that constitutes a Conclusion of Law shall be deemed a Conclusion of Law, and any Conclusion of Law that constitutes a Finding of Fact shall be deemed a Finding of Fact.

12. Jurisdiction and venue are proper as to the parties and the subject matter of the action averred.

13. All necessary and proper parties are before the Court.

SIGNED and ENTERED this 19th day of December, 1980.

/s/ Robert M. Parker
Robert M. Parker
United States District Judge

(Filed December 22, 1980)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-79-503-CA

J. D. WATKINS

V.

PENTZIEN, INC.

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law issued this day, Judgment is hereby entered for the Plaintiff for the amount of One Hundred Twenty Five Thousand ($125,000.00) Dollars. Plaintiff is found to have been 40% negligent. Thus, Plaintiff's recovery is to be Seventy Five Thousand ($75,000.00) Dollars, together with Nine (9%) interest per annum thereon until judgment is paid. Attorneys' fees and costs of suit are to be paid by Defendant.

SIGNED and ENTERED this 19th day of December, 1980.

/s/ Robert M. Parker
Robert M. Parker
United States District Judge

Opposition

Supreme Court, U.S.
FILED
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No. 81-1602

IN THE

Supreme Court of the United States

October Term, 1981

J. D. WATKINS,
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v.

PENTZIEN, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a Court of Appeals may reverse as a matter of law the decision of a lower court finder of fact with respect to the issue of whether a structure is a "vessel in navigation" under the Jones Act and the general admiralty law.

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No. 81-1602

IN THE

Supreme Court of the United States

October Term, 1981

J. D. WATKINS,
Petitioner,

v.

PENTZIEN, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION OF COURT BELOW

The opinion of the Court of Appeals for the Fifth Circuit appears at 660 F.2d 604 (5th Cir. 1981) and is included herein as Appendix A-1.

JURISDICTIONAL STATEMENT

The jurisdictional requirements are adequately set forth in the Petition.

STATUTE INVOLVED

The statute here involved is the Jones Act, 46 U.S.C. § 688.

STATEMENT OF THE CASE

Petitioner was injured while working as an hourly tar-pot laborer on a fixed pipeline construction platform. The platform was composed of two barges firmly attached end to end with one end grounded in a specially constructed slip cut into the bank of a river. The entire platform was held in a fixed position by numerous spuds. (Tr. 117, 118, 129, 130, 131) During the seven (7) days Petitioner worked on the fixed pipeline construction platform it was immovable and was not and could not be navigated. (Tr. 124). The platform was in effect an extension of land, as a pier. The platform was attached to land and was "spudded" into the shallow bottom of the Sabine River near Sabine, Texas. Upon it short sections of concrete coated pipe were welded together, coated with tar, tested and eased off into a ditch cut into marsh land at the inshore end of the construction assembly platform. The platform could not be moved unless its inshore compartments were pumped out and the spuds removed. It had no motive power, and was unmanned except for construction laborers who ate, slept and lived ashore.

The Court of Appeals held as a matter of law from the undisputed material facts that the two barges used as a pipeline construction platform were not "vessels in navigation." The court therefore denied Petitioner recovery under the Jones Act and general admiralty law.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals does not conflict with other decisions of the Fifth Circuit or with decisions of other Courts of Appeal or the United States Supreme Court. Petitioner's attempt to create such conflict is without merit.

ARGUMENT

Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957), relied upon by Petitioner, was decided 15 years before the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et. seq., was amended to extend coverage to maritime employees. More importantly, the issue of whether or not a movable dredge was a vessel was never raised in *Senko*. The holding in that case is not pertinent to the case at bar.

Petitioner misconstrues the holding of the Court of Appeals as being in conflict with *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). Respondent agrees that *Robison* stands for the proposition that determination of Jones Act status is not subject to hard and fast rules and that such determinations are to be made on a case-by-case basis. Petitioner departs from the law in its implication that *Robison* demands of appellate courts unswerving compliance with the holdings of lower court fact-finders. This is simply not so, as *Robison* itself makes clear. The Court of Appeals in the instant case recognized, and rightly so, that it cannot lightly disregard such findings of fact. But *Robison* and numerous subsequent decisions establish that such findings are not conclusive, and that an appellate court may on appropriate facts hold contrary to the fact-finder. The Court of Appeals in the instant case merely

held that this was such an occasion, in that the structure was as a matter of law not a vessel in navigation.

Petitioner seeks to avoid the holding of *Leonard v. Exxon Corp.*, 581 F.2d 522 (5th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979) by attempting to distinguish the present case from *Leonard* by erroneously characterizing the fixed pipeline assembly platform as a "lay barge". Rhetorical conclusions cannot change the fact that Petitioner was working on a fixed pipeline construction platform. The Court of Appeals, finding the construction platform "factually indistinguishable" from that in *Leonard*, correctly exercised its right to overrule the finding of the District Court.

The *per curiam* opinion of the Court of Appeals followed an established line of decisions and reasoning in reversing the District Court. See *Guidry v. Continental Oil Co.*, 640 F.2d 523 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 96 (1981); *Cook v. Belden Concrete Prod., Inc.*, 472 F.2d 999 (5th Cir. 1973), *cert. denied*, 414 U.S. 868 (1973); *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643 (1st Cir. 1973), *cert. denied*, 414 U.S. 856 (1973); *Leonard v. Exxon Corp.*, 581 F.2d 522 (5th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979). These cases, in all of which certiorari was denied, are significant for the reasons that in *Cook* and *Powers* the Court of Appeals reversed the finding of the trier of fact on the "vessel in navigation" issue while in *Leonard* and *Guidry* the Court of Appeals affirmed the District Court's decision to take this issue away from the jury.

CONCLUSION

For the reasons set forth above, the Respondent herein submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this the 30th day of March, 1982, three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served upon the attorney for Petitioner, Doyle Curry, P. O. Drawer 1249, Marshall, Texas 75670 by depositing same in the United States Mail with first-class postage attached.

L. GLEN KRATOCHVIL
Counsel for Respondent

Appendix

APPENDIX

J. D. WATKINS, Plaintiff-Appellee,

v.

PENTZIEN, INC.,
Defendant-Appellant.

No. 81-2023

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Nov. 5, 1981.

Action was brought for injuries sustained while working on barges. The United States District Court for the Eastern District of Texas, Robert M. Parker, J., entered judgment, and appeal was taken. The Court of Appeals held that two barges on which workman was working at time of his injuries were not "vessels in navigation," as required both for workman to recover on general maritime law claim and for him to be entitled to protection of Jones Act, where the barges were used as construction platform on which sections of concrete-coated pipeline were welded together, the barges were tightly secured to each other, and the barges were attached to "spuds" dropped into bed of river.

Reversed and remanded for entry of judgment in favor of defendant.

Appeal from the United States District Court for the Eastern District of Texas.

Before AINSWORTH, REAVLEY and RANDALL, Circuit Judges.

PER CURIAM:

The issue in this appeal is whether the two barges on which the appellee, J. D. Watkins, was working at the time of his injury were vessels in navigation, thereby entitling Watkins to the protection of the Jones Act and the general maritime law. The district judge found that they were. We hold that, as a matter of law, they were not vessels in navigation. Accordingly, we reverse the judgment of the district court awarding damages to Watkins on his Jones Act and general maritime law claims.

J. D. Watkins, an employee of Pentzien, Inc., was injured at work when he stooped over to pick up a chunk of tar from the deck of the barge on which he was working. Watkins had intended to throw the piece of tar toward the tar pots that he attended on the deck of one of the barges. But, unexpectedly, it stuck to other chunks of tar and, while trying to lift it, he hurt his back.

Watkins filed this action against Pentzien in the United States District Court for the Eastern District of Texas. His complaint invoked the admiralty and maritime jurisdiction of the district court and included a Jones Act claim with added counts under the general maritime law for unseaworthiness and maintenance and cure. After a trial, the district judge found that Watkins was a seaman protected by the Jones Act and that the barge upon which he was working qualified as a vessel under the Jones Act.

The district judge also resolved Watkins' general maritime law claims in his favor. A final judgment was entered awarding Watkins $75,000 in damages against Pentzien. Pentzien appeals.

[1, 2] In order to qualify for coverage under the Jones Act, a worker claiming seaman status must satisfy three criteria:

> (1) he must have more or less permanent connection with (2) a vessel in navigation and (3) the capacity in which he is employed or the duties which he performs must contribute to the function of the vessel, the accomplishment of its mission or its operation or welfare in terms of its maintenance during its movement or during anchorage for its future trips.

Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447, 452 (5th Cir. 1980). Whether these criteria are satisfied is normally a question for the trier of fact. *Beard v. Shell Oil Co.*, 606 F.2d 515, 517 (5th Cir. 1979). Nonetheless, we also have recognized that the undisputed material facts may establish as a matter of law that an individual is not a Jones Act seaman. *Guidry v. Continental Oil Co.*, 640 F.2d 523, 528-29 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3009 (U.S. July 6, 1981) (No. 81-20). In such a case, it is proper for this court to determine seaman status. *See Holland v. Allied Structural Steel Co.*, 539 F.2d 476, 479-80 (5th Cir. 1976), *cert. denied*, 429 U.S. 1105, 97 S.Ct. 1136, 51 L.Ed.2d 557 (1977).

[3] As noted at the outset, we have predicated our decision in this appeal solely on whether the two barges on

which Watkins was employed were vessels in navigation. With this in mind, we turn to the undisputed material facts.

Watkins was employed on two barges which were used as a construction platform on which sections of concrete-coated pipeline were welded together. These barges, each 200 feet long and forty feet wide, were placed end-to-end. They were tightly secured to each other on both the port and the starboard sides by steel cables. To make the barges level with each other, "I" beams were laid across their decks. One end of each "I" beam was welded to the deck of one of the barges.

After the barges had been fastened together, they were moved by tug into the Sabine River and placed at a right angle to the bank. In order to keep interference with shipping and navigation to a minimum, the barges were pushed close to the bank of the river where a slip had been dug to hold them. Four metal poles, known as spuds, were dropped to the bed of the river. The spuds were fastened to the barges by collars welded to the barges. The end of the barge nearest the bank was lowered to the level of the water by flooding several of the barge's rear compartments.

When operating, concrete-coated sections of pipe were brought to the end of the barge protruding into the river. The sections of pipe were placed on a conveyor, welded to the end of the pipeline on the barge, coated with a sealant, and eased off the end of the barge nearest to the river bank into a canal cut through the marsh. This process was repeated until a completed pipeline extended from the barge into the marsh.

We find that the two barges on which Watkins was hurt are factually indistinguishable from the pipeline construction platform on which the plaintiff in *Leonard v. Exxon Corp.*, 581 F.2d 522 (5th Cir. 1978), *cert. denied*, 441 U.S. 923, 99 S.Ct. 2032, 60 L.Ed.2d 397 (1979), was injured. In *Leonard*, we described the platform as

> four flat-deck barges. These barges were not self-propelled, and could be moved only by the application of some external source of power. Three of the barges were placed end to end and lashed securely together. According to the trial court, this three-barge structure was moored "more or less permanently" to the shore by separate steel cables. The fourth barge, which served as a crane platform and as an access ramp to the other three barges, was located between the shore and the remaining barges. This fourth barge was connected to shore by a wooden ramp. To permit the crane to service each of the three outer barges, the three-barge platform would occasionally be untied and moved slightly forward or backward until properly positioned.

581 F.2d at 524. The dissent also noted that "[o]nce the pipeline had been fabricated the string of offshore barges was towed into deeper water, and the assembled pipeline was slipped off into its destined place underneath the navigable waters of the Mississippi." *Id.* at 525 (Godbold, J., dissenting).

In *Leonard*, the district judge had granted summary judgment against the plaintiff on his Jones Act claim finding as a matter of law that the pipeline construction platform on which he worked was not a vessel. We affirmed on the basis of a prior opinion in which we held that "a similar floating construction platform, which was

neither designed for navigation nor engaged in navigation at the time of the accident, was, as a matter of law, not a vessel under the Jones Act." *Id.* at 524 (citing *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973), *cert. denied*, 414 U.S. 868, 94 S.Ct. 175, 38 L. Ed.2d 116 (1973)).

Our decision in *Leonard* controls the outcome of this appeal. The similarities between the pipeline construction platform described in *Leonard* and the structure on which Watkins was injured are unmistakable. Both were used to weld sections of the pipe together. Both consisted of barges fastened together. In neither case could the barges move under their own power. Both platforms had to be towed from place to place by a tug. In both instances the platforms were affixed "more or less permanently." *Leonard*, 581 F.2d at 524. In the instant case, the barges were held in place near the bank of the Sabine River by the spuds; in *Leonard*, they were attached close to the bank of the Mississippi by steel cables.[1] We hold, therefore, as we did

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1. The only possible difference between the pipeline construction platform in *Leonard* and the one on which Watkins was injuried is their accessibility. Although both were near the bank of a river, in *Leonard* the barges on which the plaintiff was injured could be reached by crossing over a ramp built from the bank of the river onto and across the crane barge to the three barges on which the pipeline was fabricated. In this case as the bank of the Sabine River near the barges consisted of marshland, Watkins was transported to and from his workplace by tug each day. The status of a structure as a vessel in navigation, however, is unaffected by its accessibility to those who are assigned to it. The critical inquiry is "the purpose for which the craft was constructed and the business in which it is engaged." *Cook v. Belden Concrete Prods., Inc.*, 472 F.2d 999, 1001 (5th Cir. 1973) (citing *The Robert W. Parsons*, 191 U.S. 17, 30, 24 S.Ct. 8, 12, 48 L.Ed. 73 (1903)), *cert. denied*, 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed.2d 116 (1973). *Accord, Hicks v. Ocean Drilling & Exploration Co.*, 512 F.2d 817, 823 (5th Cir. 1975), *cert. denied*, 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 639 (1976); *Berject v. American Commercial Barge Lines*, 509 F.Supp. 734, 736 (Ed. La. 1981).

in *Leonard*, that Watkins is not covered by the Jones Act as the structure on which he was injured was not a vessel in navigation. *See Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 452 (5th Cir. 1980).

Our decision that the two-barge structure on which Watkins was injured was not a vessel in navigation also disposes of his claims under the general maritime law. "For the doctrine of unseaworthiness to apply in a personal injury case, . . . the vessel [must] be in navigation." 2 M. Norris, Maritime Personal Injuries § 321, at 69 (3d ed. 1975). In order to recover for maintenance and cure, the worker must be "employed on what can be termed a 'vessel' for admiralty purposes." 1B Benedict on Admiralty § 44, at 4-12 (7th ed. 1980). We said in *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1002 (5th Cir. 1973), *cert. denied*, 414 U.S. 868, 94 S.Ct. 175, 38 L. Ed.2d 116 (1973), the decision upon which *Leonard* was predicated, that a barge used as a floating construction platform was not a vessel in navigation entitling an injured worker to claim under the general maritime law. Therefore, because the structure on which Watkins was injured was not a vessel in navigation, Watkins may not recover under the general maritime law. *See* G. Gilmore & C. Black, The Law of Admiralty § 6-21, at 329 (2d ed. 1975).

The undisputed facts in this case establish as a matter of law that Watkins neither is a Jones Act seaman nor is entitled to recover for his injuries under the general maritime law. The decision of the district court is REVERSED and the case is REMANDED for entry of judgment in favor of Pentzien, Inc. on Watkins' Jones Act and general maritime law claims.

REVERSED.